Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 13

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
OCT 20 2005
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ________ DEPUTY CLERK

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON,	§	
Plaintiffs,	§	**C. A. NO. A 05 CA ~~224~~ 334 SS**
v.	§	
FULBRIGHT & JAWORSKI, LLP	§	
Defendant.	§	

JOINT MOTION FOR ENTRY OF AGREED PROTECTIVE ORDER

Plaintiffs Immunocept, LLC, Patrice Anne Lee and James Reese Matson (collectively "Plaintiffs") and Defendant Fulbright & Jaworski, LLP jointly move the Court to enter the Agreed Protective Order attached hereto as Exhibit "A".

Federal Rule of Procedure 26(c)(7) provides that upon the motion of a party, and for good cause shown, the court may make any order "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." FED.R.CIV.P. 26(c)(7). As described in Plaintiff's First Amended Complaint, this case implicates information held by the present parties and/or third parties that may contain trade secrets or other proprietary information. Consequentially, the parties anticipate that discovery in this case will require the disclosure of confidential research, development, or commercial information. Under such circumstances, the trial judge has very wide discretion "to determine whether, to whom, and under what precautions, the revelation [of confidential information] should be made." *E.I. Dupont De Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917).

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The parties have agreed to the entry of the protective order attached hereto as Exhibit "A."

The parties respectfully ask the Court enter the Agreed Protective Order attached hereto as Exhibit "A."

Respectfully submitted this 19th day of October, 2005.

Respectfully submitted,

By: ______________________
Michael P. Lynn, P.C.
Jeffrey M. Tillotson, P.C.
John D. Volney
Jeremy Fielding
Lynn Tillotson & Pinker, LLP
750 N. St. Paul St., Suite 1400
Dallas, Texas 75201

ATTORNEYS FOR PLAINTIFFS IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON

By: David Beck w/p Jeremy Fielding
David J. Beck
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ATTORNEYS FOR DEFENDANT FULBRIGHT & JAWORSKI, LLP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served as shown below on counsel of record on October 19, 2005.

Via Certified Mail, Return-Receipt Certified
David J. Beck
Beck, Redden & Secrest, LLP
1221 McKinney St., Suite 4500
Houston, Texas 77010-2010

____
Jeremy A. Fielding

Exhibit A

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

	§	
IMMUNOCEPT, LLC, PATRICE ANNE LEE,	§	
AND JAMES REESE MATSON,	§	
	§	
Plaintiffs,	§	Cause No. A 05 CA 224 SS
	§	
v.	§	
	§	
FULBRIGHT & JAWORSKI, LLP	§	
	§	
Defendant.	§	

AGREED PROTECTIVE ORDER

WHEREAS, this is a legal malpractice action that concerns the prosecution of a patent involving private litigants and private third parties and is likely to involve disclosure of trade secret and other confidential, proprietary and/or sensitive information, there is good cause for granting an order of confidentiality.

IT IS HEREBY STIPULATED AND AGREED, pursuant to Federal Rule of Civil Procedure 26(c), by and between counsel for the parties, that this Stipulation and Order shall govern the handling of any information produced or disclosed by any party or non-party ("the Producing Party") including but not limited to Johnson & Johnson, its parents, subsidiaries, affiliates, predecessors, successors and assigns, and each of their respective officers, directors, agents, employees, stockholders and representatives (hereinafter collectively referred to as "Johnson & Johnson") in this Action including documents, deposition testimony, deposition exhibits, interrogatory responses, responses to requests for admission, information obtained during inspections of premises or things and pretrial and trial testimony (such information shall hereinafter be referred to as "Discovery Material").

1. Any Producing Party may designate any Discovery Material as "Confidential" ("Confidential Discovery Material") under the terms of this Stipulation and Order if such party in good faith believes that such Discovery Material contains nonpublic confidential, proprietary, commercially sensitive, or trade secret information.

2. Confidential Discovery Material and information derived therefrom shall be used solely for purposes of this Action and shall not be used for any other purpose, including, without limitation, any business, proprietary, commercial, governmental, or litigation purpose. Nothing herein should be construed to restrict the ability of counsel to advise their clients with respect to the litigation based upon Confidential Discovery Materials, provided that such information is not disclosed.

3. The designation of Discovery Material as "Confidential" for purposes of this Stipulation and Order shall be made in the following manner by the Producing Party:

a. In the case of documents, exhibits, briefs, memoranda, interrogatory responses, responses to requests for admission, or other materials (excluding depositions or other pretrial or trial testimony), by affixing the legend "Confidential" to each page containing any Confidential Discovery Material. In the case of documents being made available for inspection, designation shall be made by written notice sent within twenty (20) business days after the time of inspection. The parties shall treat all documents being made available by Johnson & Johnson for inspection as Confidential Discovery Material until twenty (20) business days after the inspection thereof. After twenty (20) business days, only those portions of any documents designated as "Confidential" shall be deemed Confidential Discovery Material.

b. In the case of depositions or other pretrial or trial testimony, (i) by a statement on the record, by counsel, during such deposition or other pretrial or trial proceeding or portion thereof that such testimony shall be treated as Confidential Discovery Material, in which event, the court reporter will be asked to mark the designated pages as Confidential Discovery Material as appropriate; or (ii) by written notice, sent by counsel to all parties within twenty (20) business days after receiving a copy of the transcript thereof. When so notified, counsel for the parties shall be responsible for arranging to have appropriate confidentiality legends affixed to all portions of the original and all copies of the transcript containing Confidential Discovery Material. The parties shall treat all depositions and other pretrial and trial testimony produced by Johnson and Johnson as Confidential Discovery Material until twenty (20) business days after receiving a copy of the transcript thereof. After twenty (20) business days, only those portions of any transcript designated as "Confidential" shall be deemed Confidential Discovery Material. The parties and Johnson and Johnson may modify this procedure for any particular deposition or proceeding, through agreement on the record at such deposition or proceeding or otherwise by written stipulation, but only if the parties first secure the express written consent of Johnson & Johnson to the proposed modification, without further Order of the Court.

c. In the case of information obtained during an inspection of premises or things, by written notice, sent by counsel to all parties before or within twenty (20) business days after the time of inspection. Counsel for the inspecting party shall be responsible for arranging to have the appropriate confidentiality legend affixed to all drawings, photographs, video or other documents and copies or portions thereof made at or as a result of the inspection which reflect or refer to Confidential Discovery Material observed or obtained during the inspection. The parties may modify this procedure for any particular inspection through agreement by written stipulation, but only if the parties first secure the express written consent of Johnson & Johnson to the proposed modification, without further Order of the Court.

d. Any "Confidential" designation that is inadvertently omitted may be corrected by written notification to counsel for the Receiving Party, and the Receiving Party shall thereafter mark and treat the materials as "Confidential" or as appropriate, and such materials shall be fully subject to this Stipulation and Order as if they had been initially so designated except to the extent that the Receiving Party has already disclosed the materials in a manner inconsistent with this Stipulation and Order before the receipt of such notification.

4. Discovery Material designated "Confidential" may be disclosed, summarized, described, or otherwise communicated or made available in whole or in part only to the following:

a. counsel of record for the parties in this Action, members of their firms, associate attorneys, paralegal, clerical and other regular or temporary employees of such counsel necessary to assist in the conduct of this Action for use in accordance with this Stipulation and Order;

b. outside consultants or experts ("Consultants") retained by a party in this Action; provided that each Consultant shall be identified by delivering to the Producing Party the name, address and a curriculum vitae of the Consultant in writing at least three (3) days prior to such disclosure. If, within three (3) days following receipt of such written identification, the Producing Party has objected to such disclosure, such objection shall bar the disclosure of the designated material to that person until the Producing and Receiving Parties agree otherwise or until the Court rules otherwise. No parties shall depose or otherwise seek discovery from any Consultants identified in accordance with this subparagraph if counsel seeking to disclose Discovery Material to a Consultant stipulates in writing that such Consultant will not testify at trial either at the time of identification or when discovery is sought. Nothing in the preceding sentence shall be interpreted as prohibiting a party from deposing or otherwise seeking discovery from a Consultant if there was a basis for such discovery prior to the identification by counsel of the Consultant in accordance with this subparagraph;

c. the court, court personnel and court reporters;

d. non-party witnesses, provided that each non-party witness shall be identified by delivering to the Producing Party the name, address and employer of the non-party witness in writing at least ten (10) business days prior to such disclosure. If, within ten (10) business days following receipt of such written identification, the Producing Party has objected to such disclosure, such objection shall bar the disclosure of the designated material to that person until the Producing and Receiving Parties agree otherwise or until the Court rules otherwise; or

e. any other person only upon Order of the Court or upon written stipulation of the Producing Party.

Any notice, identification or objections to disclosure that are to be made to a party under this Stipulation and Order shall be made in writing and hand-delivered to the Receiving Party or sent by confirmed facsimile transmission to the Receiving Party. Before contacting the Court to arrange for a conference regarding objections to disclosures to identified Consultants, Party Representatives, or non-party witnesses, the Producing Party and the party seeking to compel the disclosure shall first attempt to reach agreement without resort to the Court.

5. Each person to be given access to Confidential Discovery Material (collectively "Material") pursuant to this Stipulation and Order (except those individuals listed in sub-paragraphs 5(a) and 5(e)) shall be provided with a copy of this Stipulation and Order and shall be advised that (a) the Material is being disclosed pursuant to and subject to the terms of this Stipulation and Order and may not be disclosed or used other than pursuant to the terms hereof, and (b) that the violation of the terms of the Stipulation and Order (by use of the Material in any impermissible manner) may subject the person to punishment for contempt of a Court Order. Any such person to be given access to Material must first read the Stipulation and Order, and must execute, in the form attached hereto as Exhibit A, an agreement to be bound by this Order and to be subject to the jurisdiction of this Court for purposes of the enforcement of this Order. An executed copy of such agreement shall be served on counsel for the Producing Party and the original shall be retained by counsel giving access to the Material. If Material is to be disclosed during a deposition or trial, the agreement to be bound and subject to jurisdiction may be made on the record and under oath, rather than in writing, and any objections may also be made orally. Pending resolution of such objections, no disclosures of Material may be made.

6. A party witness may be examined at trial or during a deposition concerning any Confidential Discovery Material that party had prepared or lawfully received prior to and apart from this lawsuit. A non-party witness may not be shown Confidential Discovery Material except upon compliance with sub-paragraph 3(d) of this Stipulation and Order.

7. All documents of any nature, including briefs, that contain information that has been designated "Confidential" or that contain Confidential Discovery Material, that are filed with the Court shall be filed under seal in an envelope or other container marked with the title of the Action, the title of the court filing which contains the Confidential Discovery Material, and a statement substantially in the following form:

CONFIDENTIAL

FILED PURSUANT TO A PROTECTIVE ORDER DATED __________, 2005

THIS ENVELOPE IS NOT TO BE OPENED NOR ARE THE CONTENTS THEREOF TO BE DISPLAYED OR REVEALED EXCEPT BY OR TO QUALIFIED PERSONS OR BY COURT ORDER.

8. This Stipulation and Order has no effect upon, and shall not apply to, a party's use or disclosure of its own Confidential Discovery Material for any purpose. Nothing contained herein shall impose any restrictions on the use or disclosure by a party of documents, materials or information designated as Confidential Discovery Material obtained lawfully by such party independently of any proceedings in this Action, or which:

a. was already known to such party by lawful means prior to acquisition from, or disclosure by, the other party in this Action; or

b. is or becomes publicly known through no fault or act of such party; or

c. is rightfully received by such party from a third party which has authority to provide such Confidential Discovery Material and without restriction as to disclosure.

9. In the event additional parties join or are joined in this Action, they shall not have access to Confidential Discovery Material until the newly-joined party or its counsel has executed and, at the request of any party, filed with the Court its agreement to be fully bound by

this Stipulation and Order or an alternative protective Order which is satisfactory to all parties and the Court.

10. It is the present intention of the parties and Johnson & Johnson that the provisions of this Stipulation and Order shall govern discovery and other pretrial and trial proceedings in this Action. Nonetheless, each of the parties and Johnson & Johnson shall be entitled to seek modification of this Stipulation and Order by application to the Court on notice to the other parties hereto for good cause.

11. The parties and Johnson & Johnson agree to be bound by the terms of this Stipulation and Order pending its entry by the Court, or pending the entry of an alternative thereto which is satisfactory to all parties, and any violation of its terms shall be subject to the same sanctions and penalties as if this Stipulation and Order had been entered by the Court.

12. The provisions of this Stipulation and Order shall, absent written permission of the Producing Party or further Order of the Court, continue to be binding throughout and after the conclusion of this Action, including, without limitation, any appeals therefrom. Within 60 days after receiving notice of the entry of an Order, judgment or decree finally disposing of this Action, including any appeals therefrom, all persons having received Confidential Discovery Material shall return to counsel for the Producing Party such material and all copies thereof (including summaries and excerpts). Counsel shall provide a certification that all Confidential or Discovery Material has been returned pursuant to this paragraph. Outside counsel of record in this Action shall be entitled to retain court papers, deposition and trial transcripts, and attorney work product (including court papers, transcripts, and attorney work product that contains Confidential Discovery Material) provided that such counsel, and employees of such counsel, shall not disclose any Confidential Discovery Material contained in such court papers,

transcripts, or attorney work product to any person or entity except pursuant to a written agreement with the Producing Party. All material returned to the parties or their counsel by the Court likewise shall be handled in accordance with this paragraph.

13. During the pendency of this Action, any party objecting to the designation of any Material or testimony as Confidential Discovery Material may, after making a good faith effort to resolve any such objection, move for an Order vacating the designation. While such an application is pending, the Discovery Material or testimony in question shall be treated as it has been designated, either Confidential Discovery Material, pursuant to this Stipulation and Order. The provisions of this Stipulation and Order are not intended to shift the burden of establishing confidentiality.

14. In the event that any Confidential Discovery Material is used in any court proceeding in this Action or any appeal therefrom, said Confidential Discovery Material shall not lose its status as Confidential Discovery Material through such use. Counsel shall confer with the Court on such procedures (including but not limited to filing those documents that contain Confidential Discovery Material under seal) as are necessary to protect the confidentiality of any documents, information and transcripts used in the course of any court proceedings.

15. The Clerk of the Court is directed to maintain under seal all documents and transcripts of deposition testimony and answers to interrogatories, admissions and other pleadings filed under seal with the Court in this litigation which have been designated in whole or in part as "Confidential" by a Producing Party.

16. If any Receiving Party (a) is subpoenaed in another action, or (b) is served with a demand in another action to which it is a party, or (c) is served with any legal process by one not a party to this Action, seeking Material which was produced or designated as "Confidential" by

someone other than the Receiving Party, the Receiving Party shall give prompt written notice, by hand or facsimile transmission, within five business days of receipt of such subpoena, demand, or legal process, to those who produced or designated the material "Confidential" and shall object to its production to the extent permitted by law. Should the person seeking access to the Confidential Discovery Material take action against the Receiving Party or anyone else covered by this Stipulation and Order to enforce such a subpoena, demand or other legal process, the Receiving Party shall respond by setting forth the existence of this Stipulation and Order. Nothing herein shall be construed as requiring the Receiving Party or anyone else covered by this Stipulation and Order to challenge or appeal any Order requiring production of Confidential Discovery Material covered by this Stipulation and Order, or to subject itself to any penalties for non-compliance with any legal process or Order, or to seek any relief from this Court.

17. Any discovery documents produced in this litigation may be later designated as "Attorney Client Privileged" or "Attorney Work Product" promptly upon discovery by the Producing Party that any such privileged or immune document was produced through inadvertence, mistake, or other error, and no waiver or privilege or immunity shall be deemed to have occurred. Upon such designation, the Receiving Party promptly shall make best efforts to collect all copies of the documents and return them to the Producing Party. In the event that the Receiving Party believes in good faith that the Producing Party cannot properly assert any privilege or immunity with respect to the documents, the Receiving Party must notify the designating attorney in writing and the designating attorney shall within thirty (30) days of such notice file a motion to establish that the material is subject to the attorney-client privilege, the work-product privilege, or some other applicable privilege; otherwise, the claim of privilege shall be deemed waived.

STIPULATED AS TO FORM:

LYNN TILLOTSON & PINKER, L.L.P.

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713.951.3700
713.951.3720 (f)

Attorney for Defendant
Fulbright & Jaworski, LLP

SO ORDERED THIS ____ day of _____________, 2005.

____
Judge Presiding

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

	§	
IMMUNOCEPT, LLC, PATRICE ANNE LEE,	§	
AND JAMES REESE MATSON,	§	
	§	
Plaintiffs,	§	Cause No. A 05 CA 224 SS
	§	
v.	§	
	§	
FULBRIGHT & JAWORSKI, LLP	§	
	§	
Defendant.	§	

ACKNOWLEDGMENT AND AGREEMENT

I, ________________________________, acknowledge that I have received and read a copy of the attached Stipulation and Order; I agree to comply with and be bound by this Stipulation and Order; and I hereby submit to the jurisdiction of the United States District Court, Western District of Texas, Austin Division, with respect to any proceeding arising out of any claim of violation of said Stipulation and Order.

Dated this _______day of ___________________, 2005.

____
Name
Address
Employer